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Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 140

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

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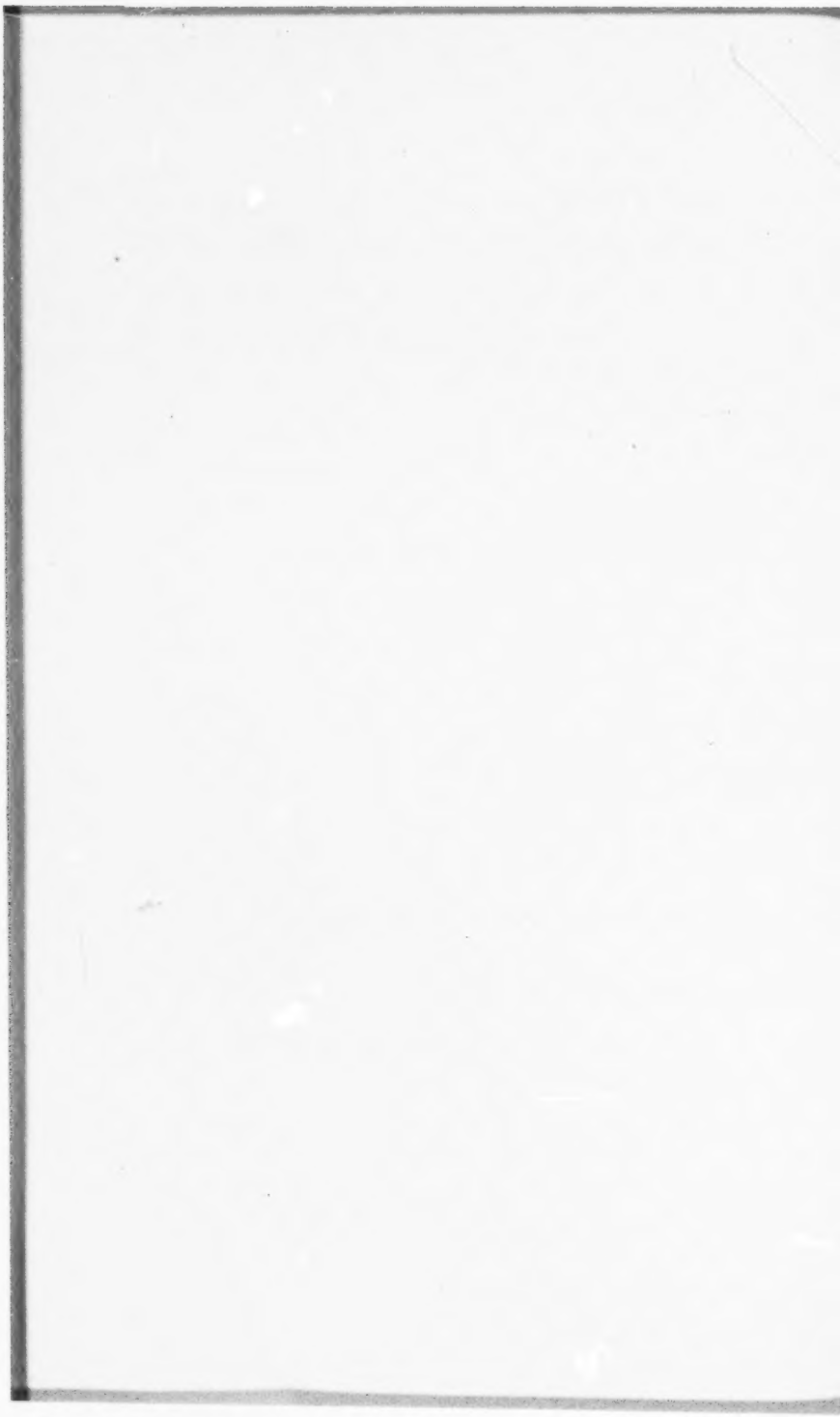

Supreme Court of the United States

OCTOBER TERM, 1943.

NO.

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioners, Edwin K. Atwood and Alice B. Atwood, individually and as Conservatrix of the Estate of Richard W. Atwood, distracted, praying for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit affirming a decree in the District Court of the United States for the Southern District of Texas, respectfully submit:

This is an action to quiet the title to all the minerals in the vast King Ranch comprising 1,000,000 acres in more than thirteen counties in the State of Texas. As an incident to quieting such title, this action seeks to establish a trust of the minerals and to secure the appointment of a successor trustee, the prior trustee having died, and to cancel two mineral leases dated Sept. 28, 1933 leasing all of said minerals to Humble Oil & Refining Company.

Mrs. King's Mineral Trust and Will.

Mrs. Henrietta M. King, the widow of Captain Richard King, was the owner of all of his vast ranching properties and estates known as the King Ranch, including the minerals therein, following his death in 1885 (R. 2516). She died in 1925 at the great age of 92 years owning the "surface" title to approximately 1,000,000 acres valued for inheritance tax purposes (without reference to minerals) at over $5,000,000 (R. 1573), together with livestock worth over $1,000,000 and other personal property also worth over $1,000,000 (R. 1612, 1816). The fair market value of the King Ranch minerals for leasing purposes over a 20-year primary term (exclusive of the immensely valuable one-eighth royalty) was over $22,000,000 in 1933, and has increased greatly since that time (R. 1440-1).

On March 1, 1919 Mrs. King "severed" all of the minerals in said 1,000,000 acres from the "surface" title and conveyed the same to Robert J. Kleberg, Sr. (R. 89-101). The instrument, after giving him extensive powers as attorney-in-fact, including wide power to lease and sell the minerals, conveyed to him in fee simple 3/32nds undivided interest in the minerals "in consideration of his services to be rendered" thereunder, and then added the following language:

"* * * I, the said Henrietta M. King have Bargained, Sold, Assigned, Transferred and Set Over, and By These Presents do Bargain, Sell, Assign, Transfer and set over, IN TRUST HOWEVER, unto him, the said Robert J. Kleberg, the other, and remaining twenty-nine thirty-seconds (29/32nds) Parts, * * * (describing the minerals) which I now own * * * or to which I shall, at the time of my death, or my Estate shall, in any manner, and at any time own, or be entitled to possess, or receive, now, or hereafter, * * *.

"THIS DECLARATION OF TRUST, AND THE TRUST HEREBY CREATED, to continue to be, and exist, and continue in full force and effect, for the full term of FIFTY (50) YEARS, from this, the First (1st) day of March, A. D. 1919, for the Uses and Purposes, and for all such Uses and Purposes, and for the Benefit of all such person or persons, as I may hereafter, in writing, designate and declare, or by my Will provide for, otherwise this said twenty-nine thirty-seconds (29/32nds) of all such Oil, Gas, Sulphur, Coal, or other Minerals to be, and remain, my own Property, and for my own Sole Use and Benefit, and at my death, unless disposed of, be, and constitute a part, of my Estate." (R. 92.)

This mineral trust was formally recorded in six Texas counties where the minerals lay by Mrs. King in 1919, and in seven more Texas counties by her residuary (testamentary) trustees after her death in 1925 (R. 93-101, 802).

The Circuit Court of Appeals appears to have thought that this mineral trust might have been "an unfinished and incomplete instrument" (R. 3124); but the defendants themselves pleaded that the mineral trust was valid and effective from 1919 to Mrs. King's death in 1925 (R. 186-8,

195, 205, etc.) and admitted in their pleadings that nearly 200 mineral leases made by Kleberg *acting as mineral "Trustee for Mrs. Henrietta M. King"* between 1919 and 1925 "conveyed fee determinable estates in the minerals," which mineral leases were made "with the full knowledge and consent of Mrs. King" who "fully ratified everything" the mineral trustee did (R. 207, 443-4, 457-9, 529-30, 551, etc.). The defendants also admitted in their pleadings that on March 31, 1925, the date of Mrs. King's death, the entire King Ranch minerals were exclusively owned in fee simple determinable by the Humble Company under perpetual mineral leases made by Kleberg *acting as mineral trustee* in 1922-4 (and earlier) (R. 443, 2822-3036), which leases had been acquired and developed at a cost to the Humble Company of over $350,000 (R. 2382, 2839, 2911, 3085-97). These leases were a *second* "severance" of all the minerals from the King Ranch lands, the right of reverter under such leases being in Kleberg (*not* in Mrs. King).

The Circuit Court of Appeals also held, alternatively, that the mineral trust terminated on Mrs. King's death because she made no effective disposition of the mineral interest and designated no uses, purposes and beneficiaries thereunder in her will (R. 3125). Mrs. King's will, after specific bequests, devised *all the rest and residue of her estate, real, personal, and mixed,* to eight residuary trustees (Robert J. Kleberg, Sr. and seven others) for a period of ten years from the date of her death and until the final partition and distribution by them of all of her residuary estate (R. 62). She directed the trustees to pay small annuities monthly (less than 4% of the gross income of her estate) to her descendants (R. 71-2), and she granted her residuary trustees power *in general terms* (1) to hold and manage the trust estate, (2) to lease and sell it and

invest the proceeds, and (3) to borrow money and secure the same by liens thereon (R. 71, 81-3).

She granted the trustees no special powers (1) *to develop the minerals or conduct mining operations which would "waste" the estate; or* (2) *to lease or sell the minerals upon royalties, rentals or installments payable beyond the termination of the ten-year residuary trust.*

Upon expiration of the trust period the residuary trustees were mandatorily directed to partition and distribute the entire residuary trust estate to her children and grandchildren *per stirpes* as follows:

To her son, Richard King, and to her daughter, Alice Kleberg, or their descendants, if deceased, each, the whole, and to her granddaughter Henrietta Welton Page or, if deceased, to her descendants, and to her grandchildren, the children of Nettie King Atwood or, if deceased, to their descendants, each, one-half, of (a) certain specifically devised lands and property; (b) one equal one-fourth of all other personal or mixed property not otherwise devised or bequeathed which at the final partition of her estate remained in the hands of the trustees subject to partition; and (c) one equal one-fourth of *all other property, real, personal or mixed,* not otherwise specifically enumerated, devised, or bequeathed, then subject to partition (R. 74-81).

Captain and Mrs. King had four children, all of whom, except one, predeceased their mother. Mrs. King's descendants on the date of her death were (1) her daughter, Alice Kleberg; (2) the children of her son, Richard King; (3) Henrietta Welton Page, the child of Ella King Welton, her daughter; and (4) the children of Nettie King Atwood, her daughter (R. 835-6). Plaintiffs are three of the four

Atwood grandchildren; and defendants are all of the other beneficiaries and the residuary trustees.

The Circuit Court of Appeals held, as we have stated, that the mineral trust failed and terminated on Mrs. King's death because she made no effective disposition of the beneficial interest under the mineral trust and designated no purposes, uses and beneficiaries thereunder in her will (R. 3125-6).

Petitioners say that this holding is squarely in conflict with the estoppel by judgment in the Tule partition decree referred to below and with the local law of the State of Texas, which law the lower Federal Courts have failed and refused to follow. (See Brief below.)

The San Salvador del Tule Grant Partition Decree.

Robert J. Kleberg died in 1932 at the age of 78 (R. 1102). Between Mrs. King's death in 1925 and his death in 1932 Kleberg, *acting as mineral trustee*, conveyed as grantor and accepted as grantee the same minerals originally conveyed to him by the March 1, 1919 mineral trust in ten separate transactions (R. 2564-2801). Among these were two conveyances in 1927 and in February, 1930 from Humble Oil & Refining Company to Kleberg, *as mineral trustee*, and to his *successors* in trust, surrendering and re-conveying to them *in that capacity under the mineral trust* all of the minerals previously leased by him (with Mrs. King's consent and approval) to Humble Oil & Refining Company in 1922-4 (and earlier) prior to Mrs. King's death in 1925 (R. 2723, 2801).

Also between 1925 and 1930 Kleberg, *acting as mineral trustee*, participated in three lawsuits involving the min-

erals held by him in trust. The first was a quiet title proceeding to clear title to 5100 mineral acres of the King Ranch in which a valid decree *in rem* was entered on January 8, 1929 adjudging Kleberg, *as mineral trustee,* to be the owner of the minerals and the residuary trustees to be the owners of the "surface" (R. 2700). This decree, to which the Humble Company was a party, stands unimpaired to this day. In the second, Kleberg, *acting solely as mineral trustee,* brought suit to restrain certain condemnation proceedings which the residuary trustees had failed to block (R. 2725).

The third was a partition and quiet title proceeding under Texas law in which a final decree of partition of the famous San Salvador del Tule Grant of 500,000 acres was entered on July 21, 1930 decreeing *in rem* that Kleberg, *as mineral trustee,* was the owner of all of the minerals in 127,000 acres of the King Ranch and that the residuary trustees were the owners of the "surface" in the same 127,000 acres (R. 514-7, 2743). (Certified copy of original decree transmitted to this Court.) This decree was entered after 20 years of litigation and five months after all the King Ranch minerals had been finally reconveyed by Humble to Kleberg *as mineral trustee* and to his "successors" on February 24, 1930 (R. 2723, 2801). It is this last decree to which we make special reference here.

"Unknown Heirs" and "Unknown Owners" were made defendants to this proceeding by all the methods known by Texas statutes, and this partition decree forever partitioned and quieted the title to both minerals and surface *in full compliance with Texas law* (R. 2742, 2792). This Tule partition decree *in rem,* under the established law of Texas (see Brief below) is not only *res judicata* against

the world and therefore binding upon all persons, including all parties to this cause, interested in the 127,000 mineral acres therein and herein involved, but is *also* an estoppel by judgment against the contradictory holding of the Circuit Court of Appeals above referred to that the mineral trust had previously terminated in 1925.

The Circuit Court of Appeals held that the residuary trustees, who intervened as actual parties in the Tule partition suit and who represented therein the ultimate beneficiaries (R. 2753), could not act "in derogation of the terms" of Mrs. King's will and thereby bind the beneficiaries; and that since the ultimate beneficiaries were not *also actual parties* to the Tule partition decree "in the right in which they now appear in this Court" (as distinguished from Unknown Heirs and Unknown Owners), the Tule decree *in rem* could not be effective "as an estoppel or otherwise against them" (R. 3123). The Circuit Court did not in words deny that the ultimate beneficiaries were in privity with both the mineral trustee and the residuary trustees, nor deny that they were in any event included among "unknown heirs" and "unknown owners"; but this must be the effect of its decision.

Petitioners say that this holding is in violation of the "full faith and credit" clause of the Constitution and laws of the United States and with the statutes and decisions, and therefore the established law, of the State of Texas. (See Brief below.)

Kleberg's Deed of July 3, 1928.

On July 3, 1928 (three years *after* Mrs. King's death) Kleberg, *acting as mineral trustee,* purported to terminate and repudiate the mineral trust of March 1, 1919

by retaining the 3/32nds of the minerals conveyed to him thereunder "for my services to her under said instrument," and by conveying the remaining 29/32nds minerals to the residuary trustees, reciting that it was his "intention to merge the title" to the 29/32nds minerals "with the title to the respective lands, forever free" of the mineral trust (R. 102). The residuary trustees claimed in their pleadings that this deed in 1928 "merged" the minerals with the "surface" (R. 189, 196); but Humble pleaded that this deed appointed the residuary trustees *as successors in trust* to Kleberg *as mineral trustee* (R. 91, 210). There was not one word in this deed to the effect that the mineral trust had terminated on Mrs. King's death *three years* earlier; on the contrary, it was a present conveyance in 1928 (R. 102, 107).

The Circuit Court of Appeals correctly held that this deed was utterly "without effect, for if the trust was in fact and in law continued. Kleberg had no authority to bring it to an end." (R. 3123).

The recitals of this abortive deed were obviously another estoppel against the inconsistent contention that the mineral trust had already terminated three years earlier on Mrs. King's death.

The Humble 1933 Mineral Leases.

On Sept. 26, 1933 the residuary trustees, acting as though they were the sole owners of the minerals, executed two new leases to Humble Oil & Refining Company purporting to lease the entire King Ranch minerals for a minimum "primary" term of twenty years, and thereafter in perpetuity so long as minerals should be produced therefrom (R. 109,

136). These leases, therefore, extended a minimum of 18½ years beyond the termination of the ten-year residuary trust period which ended in March, 1935; and in the event minerals were developed, the leases were to continue on in perpetuity so long as minerals should be produced.

The effect of these leases was thus not only to "waste" the minerals but also to deprive the beneficiaries of their (unclouded) fee simple title to the minerals to which the beneficiaries were entitled upon termination of the 10-year testamentary trust on March 31, 1935, upon which date the minerals were mandatorially to be distributed under Mrs. King's will (R. 74-5).

No oil was ever produced or other minerals developed on the King Ranch at any time prior to Mrs. King's death in 1925 (R. 3096).

The Circuit Court of Appeals held that the residuary trustees, under the mere *general* power to lease or sell the trust estate (without any reference to minerals as such or to mineral leases), nevertheless had *special* power (1) to conduct mining operations which would "waste" the minerals, though none had been developed in Mrs. King's lifetime, and (2) to lease or sell the minerals upon royalties, rentals and installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust in March, 1935 (R. 3116, 3186).

The Circuit Court of Appeals thus held that the Humble 1933 mineral leases were valid and within the powers of the residuary trustees even though (a) they were made by the residuary trustees (and not by the mineral trustee) as lessor, and (b) even though they constituted "waste" of the mineral estate, and (c) even though they clouded the

title to all the minerals and deprived plaintiffs of their share thereof for 18½ years and possibly in perpetuity after the trust finally terminated in 1935.

Petitioners say that these holdings are squarely in conflict with the law of the State of Texas as laid down by its Supreme Court, which law the Federal Courts are required to apply by the decisions of this Court. (See Brief below.)

It is to review the action of the Circuit Court of Appeals as above set forth that this Petition for Writ of Certiorari is filed in this Court.

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Fifth Circuit in this case, that the Tule partition decree *in rem* is not binding as *res judicata* and as an estoppel by judgment upon the beneficiaries under the mineral trust or under Mrs. King's will, fails to give such decree "full faith and credit" and therefore *directly conflicts upon a question of Federal law* with the provisions of Section 1, Article 4 of the Constitution of the United States, with the provisions of Section 905 of the Revised Statutes (28 U.S. C.A. 687), with all of the decisions of this Court, and with the applicable statutes and laws of the State of Texas.

The decision of the Circuit Court of Appeals for the Fifth Circuit in this case also directly conflicts with the decisions of this Court which require all Federal Courts to follow the local law of the state in which the controversy or transaction arose or in a proceeding *in rem*, in which the real property in question lies. Since the real property in this case, as well as Mrs. King's mineral trust

and will and their respective trustees, are all clearly subject to the law of the State of Texas, and since, as we show below in our Brief in support of this Petition, the decision of the Circuit Court of Appeals for the Fifth Circuit is squarely in conflict with the established law of the State of Texas applicable to the powers of trustees to commit "waste" and to make leases extending long beyond the trust term, it follows that this Court has jurisdiction to alter or amend the decision of the Circuit Court of Appeals to conform with the law of the State of Texas.

The Questions Presented.

There are four questions presented, all of which petitioners answer in the negative:

1. Did the Circuit Court of Appeals give "full faith and credit" to the San Salvador del Tule partition decree *in rem* as *res judicata* binding upon the world (including all parties to this cause) as to 127,000 mineral acres, and as an estoppel by judgment binding upon the beneficiaries under Mrs. King's will as to the continuance of the mineral trust to 1930, as required by Section 1, Article 4 of the Federal Constitution, by Section 905 of the Revised Statutes (28 U.S.C.A. 687), by the decisions of this Court, and by the statutes and laws of the State of Texas?

2. Did the Circuit Court of Appeals follow and apply the law of the State of Texas in holding that Mrs. King in her will made no effective disposition of the beneficial interest and designated no uses, purposes and beneficiaries under the mineral trust, thereby ending the 50-year term of the mineral trust upon her death only six years later?

3. Did the Circuit Court of Appeals follow and apply the law of the State of Texas in holding that the mere

general power to lease or sell (without any reference to minerals as such or to mineral leases) gave the residuary trustees under Mrs. King's will the *special* power to develop and produce (or "waste") the minerals, none of which had been developed in her lifetime?

4. Did the Circuit Court of Appeals follow and apply the law of the State of Texas in holding that the mere *general* power to lease or sell gave the residuary trustees under Mrs. King's will the *special* power to lease or sell minerals upon royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust estate?

Reasons for the Allowance of the Writ.

These reasons clearly appear from the foregoing outline of the questions presented and from the following statement:

The "Full Faith and Credit" Clause.

Under Section 1, Article 4 of the Constitution of the United States, under Revised Statutes, Section 905 (28 U.S.C.A. 687), and under the decisions of this Court, the Federal Courts are required to give "full faith and credit" to the Tule partition decree *in rem* as *res judicata* binding upon the world as to title to 127,000 mineral acres and as an estoppel by judgment binding upon all parties to this cause against the termination of the mineral trust on Mrs. King's death. This is also the established law of Texas.

The decree of the District Court in this case, as affirmed by the Circuit Court of Appeals for the Fifth Circuit,

fails to give any "faith" or "credit" to the Tule partition decree *in rem*. On the contrary, it is squarely in conflict with the Tule partition decree. This Tule decree adjudicated the title to 127,000 mineral acres of the King Ranch in 1930 to be still in Robert J. Kleberg, Sr., *as mineral trustee* under the March 1, 1919 mineral trust; and he died in 1932 without disposing of that title and without a successor in trust being named. The decree as affirmed in the case at bar, on the contrary, adjudicated the title to these very same minerals as of 1925 in the residuary trustees and as of 1933 in the Humble Company under new leases made in that year.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is directly in conflict upon a question of Federal law with Section 1, Article 4 of the Federal Constitution, with Revised Statutes, Section 905 (28 U.S.C.A. 687), with the decisions of this Court, and with the applicable statutes and decisions of the State of Texas.

The Circuit Court of Appeals failed to follow the local law of the State of Texas.

The decree of the District Court, as affirmed by the Circuit Court of Appeals for the Fifth Circuit, in violation of the established law of the State of Texas, held that the residuary trustees under Mrs. King's will had power to develop or "waste" the minerals and to lease or sell them upon royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust in 1935.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case

is directly in conflict with the decisions of this Court holding that the Federal Court must follow the local law of the State of Texas in controversies relating to real property and other rights settled by the state law, in this case the State of Texas, in the foregoing particulars.

The questions here involved are extremely important. Leaving out of consideration the fact that vast property interests are here involved, it is of the utmost importance that this Court shall make certain that the Federal Courts have not over-ridden real property rights arising under a formal partition decree *in rem* in one of the state courts in Texas.

Moreover the holding (1) that Mrs. King's will failed to dispose of the beneficial interest and designated no uses, purposes and beneficiaries under her mineral trust; and (2) the holding that the mere general power to lease or sell the residuary trust estate (without any reference to minerals as such as to mineral leases) gave the residuary trustees the right (a) to conduct mining operations which would "waste" the minerals, and (b) to lease or sell minerals upon royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust, are each alike plainly in contravention of the established law of the State of Texas, as well as of the weight of authority elsewhere.

Under the relevant decisions of this Court hereinafter cited, such flagrant disregard of the state law provides ample reason for the allowance of the Writ sought in this case.

Wherefore, Petitioners pray that a Writ of Certiorari be issued under the Seal of this Court, directed to the

United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; that said final decree of said District Court as affirmed by said Circuit Court of Appeals for the Fifth Circuit be reversed or altered by this Honorable Court; and petitioners also pray for such other, further or different relief as may seem proper.

And these petitioners will ever pray, etc.

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, Distracted, *Petitioners,*

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The District Court of the United States for the Southern District of Texas rendered two memoranda opinions on February 13, 1939 (R. 238) and August 13, 1940 (R. 657). Its Findings of Fact (R. 659), Conclusions of Law (R. 671) and Final Decree (R. 672) were entered October 1, 1940.

The United States Circuit Court of Appeals for the Fifth Circuit rendered its opinions in this case on January 27, 1943 and on April 6, 1943 on Petition for Rehearing. The opinions are set forth on pages 3114-3126 and 3185-7 of the Record. The former is now reported at 133 Fed. (2) 69.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fifth Circuit on January 27, 1943 and on April 6, 1943 on Petition for Rehearing. A Writ of Certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented, see this Petition (pp. 1 to 13).

Specification of Errors.

1. The Circuit Court of Appeals for the Fifth Circuit erred in affirming the decree entered by the District Court of the United States for the Southern District of Texas.

2. The Circuit Court of Appeals for the Fifth Circuit erred in not reversing said decree in the District Court.

3. The Circuit Court of Appeals for the Fifth Circuit erred in not holding that the District Court must give "full faith and credit" to the Tule partition decree *in rem* as *res judicata* and binding upon the world as to title to 127,000 mineral acres, under Section 1, Article 4 of the Constitution of the United States, under Revised Statutes, Section 905 (28 U.S.C.A. 687), under the decisions of this Court, and under the established law of the State of Texas.

4. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State of Texas that the Tule partition decree *in rem* was an estoppel by judgment against the termination of the mineral trust on Mrs. King's death.

5. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the laws of the United States and of the State of Texas that Mrs. King's will effectively disposed of the beneficial interest and designated the uses, purposes and beneficiaries under the mineral trust of March 1, 1919 and that such mineral trust did not terminate on her death in six years, but is valid for the entire 50-year term from March 1, 1919.

6. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State

of Texas that the Humble 1933 leases were invalid for want of title in the residuary trustees as lessors.

7. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State of Texas that the Humble 1933 leases were invalid because the residuary trustees under Mrs. King's will had no power to conduct mining operations which would "waste" the minerals.

8. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State of Texas that the Humble 1933 leases were also invalid because the residuary trustees under Mrs. King's will had no power to lease or sell the minerals upon royalties, rentals, and installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust in March, 1935.

Summary of Argument.

The points of the Argument follow paragraphs 3 to 8 of the Specification of Errors above.

ARGUMENT.

I.

The Circuit Court of Appeals failed to give "full faith and credit" to the Tule partition decree in rem.

The San Salvador del Tule Grant partition suit was one of the largest and most important partition suits in the history of Texas. It involved nearly half a million acres and was originally filed in 1910 to quiet title to land in Hidalgo and Cameron Counties, Texas, originally granted by the Spanish Crown in 1797 (R. 2737). There were nearly 2,000 claimants in the Grant, of whom Mrs. King was by far the largest (R. 2249). The litigation was conducted before John I. Kleiber, Master in Chancery, over a period of 20 years. Mrs. King was represented by James B. Wells, the attorney who drew both her mineral trust and will, and who also represented other parties-defendant (R. 832, 883, 2248, 3104).

The litigation was largely financed by Mrs. King in her lifetime and by her residuary trustees after her death. She advanced over $20,817.05 and her residuary trustees advanced over $27,180.59 to the Master, apart from her large attorneys' fees (R. 881-2, 2925-7).

An amended complaint was filed in April, 1924, summons was issued, and publication was had upon 700 defendants, as well as upon "Unknown Heirs" and "Unknown Owners," in full compliance with the Texas statutes (R. 2292-7).

In 1930, five years after Mrs. King's death, Kleberg, *acting as mineral trustee,* intervened in this case claiming

title to 129,267.4 mineral acres (R. 2743). He was represented by attorneys Edward R. Kleberg and J. K. Wells (R. 2745). He attached a copy of the mineral trust to his intervening petition (R. 2746). He claimed to be the owner individually as to 3/32nds minerals and to be the owner as trustee of the remaining 29/32nds minerals (R. 2743). On the same date the residuary trustees also intervened claiming ownership in the "surface" to the same lands (R. 2753).

A certified copy of the original final decree of partition entered July 21, 1930 has been transmitted to this Court. It shows conclusively that the Court adjudicated full title to 127,972.8 mineral acres in the King Ranch in the manner prayed in Kleberg's petition, *i.e.*, 3/32nds to him individually and 29/32nds to him *as mineral trustee*. The mineral trust of March 1, 1919 was incorporated by specific reference in the decree. The crucial paragraphs of the decree appear on pages 514-7 of the record. They show that Kleberg, *as mineral trustee*, and the eight residuary trustees under Mrs. King's will "and those hereafter claiming or to claim by, through, or under them" were all perpetually enjoined and restrained from asserting "any right or title acquired prior to the date hereof" (R. 515).

This partition decree *in rem* has never been appealed or attacked and stands unimpaired to this date. The defendant beneficiaries took deeds from the residuary trustees upon distribution of the residuary trust (R. 301, 387, 2084), and have relied upon the Tule decree for their titles to the "surface" lands ever since the decree was rendered. All defendants in their pleadings admitted that the Tule decree was a valid partition decree (R. 591, etc.).

It is the established law of Texas (Art. 6100[1] of Tex.

[1] See Appendix.

Rev. Stat. in effect since 1879) that a partition decree vests in each distributee a title as fully and effectually as a deed of the parties could vest the same. It is unnecessary to cite the Texas cases holding that a valid partition decree binding by publication service of process upon all "Unknown Owners" and "Unknown Heirs" is a decree *in rem* binding as *res judicata* upon the world and as an estoppel by judgment upon all parties interested in the real estate so partitioned and those in privity with them. *Carnes* v. *Carnes*, 64 S. W. 877; *Parks* v. *Knox*, 130 S. W. 203.

That the Federal Courts must give "full faith and credit" to the Tule partition decree *in rem* as *res judicata* binding upon the world is clearly established under Article 4, Section 1 of the Federal Constitution, under Revised Statutes, Section 905 (28 U.S.C.A. 687), and under the decisions of this Court.

Cooper v. *Newell*, 173 U. S. 555, 567;

Huron Holding Corp. v. *Lincoln Mine Operating Co.*, 312 U. S. 183;

Davis v. *Davis*, 305 U. S. 32;

Milwaukee County v. *M. E. White Co.*, 296 U. S. 268;

Bradford El. Light Co. v. *Clapper*, 286 U. S. 145, 155.

Plaintiffs pleaded the Tule partition decree *in rem* in the District Court not only as *res judicata* as to the 127,000 mineral acres therein adjudicated to Kleberg *as mineral trustee*, but also as an estoppel by judgment against the holding subsequently made by the District Court and affirmed by the Circuit Court of Appeals that the mineral trust terminated in 1925 (R. 617-8). Obviously a valid judgment which adjudicated the continuance of the mineral trust and which was entered in 1930, *five years after*

Mrs. King's death, is an effective estoppel by judgment against the contradictory contention that the mineral trust had terminated five years earlier on Mrs. King's death in 1925, for this was an inevitable result of the adjudication of title in Kleberg *as mineral trustee.*

Cromwell v. *County of Sac,* 94 U. S. 351;
New Orleans v. *Citizens' Bank,* 167 U. S. 371;
Fayerweather v. *Ritch,* 195 U. S. 276.

The Circuit Court of Appeals in its opinion held that the residuary trustees, who became actual parties to the suit, could not act "in derogation of the terms" of the will and thereby bind the beneficiaries. It is the established law of Texas (as well as other states) that where trustees, as here, hold full title to the trust estate, the beneficiaries are in privity with them and are bound by a decree involving the trust property.

Village Mills Co. v. *Houston Oil Co.,* 241 S. W. 122;
Lipsitz v. *First Nat'l Bank,* 288 S. W. 609;
Chicago R. I. & P. Ry. v. *Schendel,* 270 U. S. 611;
Collins v. *Crawford,* 103 S. W. 537;
Scott v. *Scott,* 139 N. E. 70;
Kenyon v. *Davis,* 69 Atl. 62.

That both the mineral trustee and the residuary trustees necessarily held the full title in fee simple to the minerals and "surface" respectively is uncontrovertible in this case. Mrs. King as beneficiary during her life and her residuary trustee after her death for 10 years and her beneficiaries thereafter, named in her will, held the "beneficial interest" under the mineral trust, *i.e.,* the right to receive the entire proceeds of the liquidation of the minerals; but they held no title in the minerals themselves during the 50-year term, the full fee simple title thereto being in

the mineral trustee. As to the mineral trust, Kleberg, *as mineral trustee* could not have conveyed fee simple determinable estates in the minerals to the successive lessees under the mineral leases made by him with Mrs. King's approval in her lifetime, as the defendants all pleaded (R. 207, 443-4, 457-9, 529-30, 551, etc.), if he had not had full title in fee simple to the minerals. As to the residuary trustees, they could not have sold large portions of the "surface" lands in Mrs. King's estate if they had not likewise held full title in fee simple thereto (R. 1837-2041). Indeed the Circuit Court of Appeals in sustaining the Humble 1933 leases necessarily held that the residuary trustees had full title in fee simple for this purpose. It has always been the law in Texas (as in all other common law jurisdictions) that a trustee holds whatever title is necessary to effectuate the trust.

Parks v. *Powell*, 56 S. W. (2d) 323;
Sims v. *McMullan*, 22 S. W. (2d) 313;
Fidelity Lbr. Co. v. *Bendy*, 245 S. W. 981;
Montgomery v. *Truehart*, 146 S. W. 284;
Restatement of Law of Trusts, Vol. 1, § 88.

The Tule decree does not pretend to construe the meaning or terms of the mineral trust; nor does it pretend to adjudicate the respective rights of the beneficiaries who took the beneficial interest thereunder by Mrs. King's will. This, however, does not prevent the Tule decree from validly *partitioning* the minerals in 127,000 acres to Kleberg *as mineral trustee.*

In some of the cases where the beneficiaries are bound because they are in privity with their trustees, the decree may not necessarily adjudicate any of the rights of the beneficiaries *inter se;* but this does not prevent the decree from being binding upon the group or class of beneficiaries

as a whole. *James* v. *James,* 164 S. W. 47, cited by defendants, was a partition suit in which such a situation arose. The Texas Court said, page 48:

> "It is frequently the case that, in partition suits, a group of litigants who are jointly entitled to a certain share of property do not wish to partition between themselves, but merely ask that they jointly be awarded a certain share."

The Court held that the decree in that case made no adjudication of the rights of the beneficiaries *inter se,* but was binding up the group as a whole. *Parks* v. *Knox,* 130 S. W. 203.

The case of *Village Mills Co.* v. *Houston Oil Co.,* 186 S. W. 785, also cited by defendants, held that a decree binding upon a trustee with title also binds all beneficiaries in a partition suit, even if they are not made parties to the suit. *Lipsitz* v. *First Natl. Bk.,* 288 S. W. 609. Indeed the Circuit Court of Appeals in holding that the residuary trustees had power to enter into the Humble 1933 leases could *only* have proceeded on the theory, since the beneficiaries did not themselves join therein, that they were in privity with the residuary trustees and were bound thereby.

Thus the refusal of the District Court and the Circuit Court of Appeals in this case to hold that the Tule partition decree *in rem* was effective as *res judicata* and as a valid estoppel by judgment plainly fails to give "full faith and credit" thereto under the Federal Constitution and Revised Statutes, and under the established law of Texas. Such a decree binds not only the actual parties to the litigation but all other "Unknown Owners" and "Unknown Heirs" in general, and all beneficiaries of both the mineral trust and the residuary trust in particular, even though the several rights of such beneficiaries were not

determined and adjudicated *inter se.* (Vernon's Ann. Civ. Stat., Art. 6085.) (See appendix.)

It follows that this Court has jurisdiction, not only under the Federal Constitution and Statutes but also under the cases hereinafter cited requiring the Federal Courts to follow the local law of the state courts in matters affecting real property rights *in rem,* to issue the Writ of Certiorari herein sought and to reverse the erroneous decision in the courts below.

This is a quiet title proceeding; and under the Tule decree the title to at least 127,972.8 mineral acres in the King Ranch should be affirmed in the mineral trust of March 1, 1919, and a successor trustee should be appointed to continue to administer the mineral trust during the balance of the 50-year term from March 1, 1919 to March 1, 1969, as prayed in the complaint (R. 264).

II.

The Circuit Court of Appeals refused to follow the Texas law in holding that the mineral trust failed and terminated on Mrs. King's death.

Although both the District Court and the Circuit Court of Appeals expressed some uncertainty as to whether the mineral trust was ever validly created in the first place and thereafter continued to be effective during Mrs. King's lifetime, the defendants themselves pleaded that the mineral trust was valid from its inception in 1919 to Mrs. King's death in 1925 (R. 186-8, 195, 205, etc.); and all of the defendants admitted in their pleadings that Kleberg, *acting as mineral trustee,* had validly conveyed fee simple determinable estates in the minerals "with the full knowledge and consent of Mrs. King" during her lifetime (R.

207, 443-4, 457, 529-30, 551, etc.)). Indeed in the light of the undisputed fact, as admitted in defendants' pleadings (R. 443, etc.), that the Humble Company held on the date of Mrs. King's death the fee simple determinable title to all the minerals in the King Ranch under mineral leases made by Kleberg *acting as mineral trustee* in 1922-4 (and earlier) (R. 2822-3036), which mineral title the Humble had acquired and developed at a cost to it of over $350,000 (R. 2382, 3095-7), the defendants' position that the mineral trust was valid and effective during Mrs. King's lifetime could not have been seriously controverted by them; and the doubt expressed by the District Court and the Circuit Court of Appeals on this point only serves to cast a shadow upon its entire position with regard to the mineral trust.

The Circuit Court of Appeals based its holding that the mineral trust terminated on Mrs. King's death upon the erroneous theory that in her will she had made no effective disposition of the mineral interest and had designated no uses, purposes and beneficiaries under the mineral trust (R. 3125-6). We think this cannot be sustained.

The Supreme Court of Texas has squarely held in *Humphreys* v. *Gammon*, 113 Tex. 247, 254 S. W. 296, and *Munsey* v. *Mills*, 115 Tex. 469, 283 S. W. 754, that such an outright conveyance as the March 1, 1919 mineral trust is a valid "severance" of the minerals from the "surface" of the land. The rule established in these cases has been followed by this Court. *Burnet* v. *Harmel*, 287 U. S. 103; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; *Downman* v. *Texas*, 231 U. S. 343. That Mrs. King's will, under its provisions establishing the residuary trust for ten years and thereafter distributing the residuary trust property to her descendants in the broadest possible language, effectively

disposed of the beneficial interest and designated the "purposes, uses and beneficiaries" to take the entire beneficial interest under the mineral trust would seem too clear for argument. This is the very purpose of a residuary clause. *Mayer* v. *Am. Trust Co.*, 222 U. S. 295.

Indeed if these very same provisions of Mrs. King's will were effective to pass the (entire) mineral title (whether severed or unsevered) as the District Court and the Circuit Court of Appeals both held, it must irresistibly follow that the very same clauses were effective to pass the (lesser) beneficial interest under the mineral trust. The residuary trustees themselves distributed nearly 1,000,000 acres of land under the various residuary clauses of the will (R. 331-3, 395-407, 2095-2108), thus showing that the will was effective to dispose of the entire beneficial interest in the mineral trust, exactly contrary to the Circuit Court's opinion.

It follows that, since the mineral trust did *not* terminate on Mrs. King's death, the "otherwise" clause at the end of the mineral trust instrument never became operative. This clause in no event could have "prevented" Mrs. King from disposing of the beneficial interest under the mineral trust by her will, as the Circuit Court correctly says (R. 3122). Neither did the word "hereafter" prevent Mrs. King's will from designating and disposing of her beneficial interest under the mineral trust. For under Texas law a will is just "a piece of paper" until the testator's death and only becomes a will and operates as such on and after that date. *Jones* v. *Eastham*, 36 S. W. (2) 538 and other cases there cited.

Moreover the *twice* repeated reference in the mineral trust itself to minerals which "*my Estate* shall, *after my death*, in any manner * * * own" (R. 89, 91) shows *con-*

clusively that Mrs. King wished the mineral trust to go on *after her death* "for the full term of FIFTY (50) YEARS from this, the First (1st) day of March, A. D. 1919." (R. 92).

It will be noted in the Circuit Court of Appeals' original opinion filed January 27, 1943, that it held not only that the mineral trust had terminated on Mrs. King's death, but that the District Court had decided that the severed minerals had somehow become "merged in and a part of the (surface) land" (R. 3126). Plaintiffs filed a petition for rehearing establishing beyond question that the District Court had not held that there was any such "merger" of several minerals with "surface" land either on Mrs. King's death or subsequently on the authority of the *Humphreys* and *Munsey* cases (R. 3127); and plaintiffs there pointed out that even if the mineral trust had terminated on Mrs. King's death, there would have been no "merger" either (a) of the severed minerals with the "surface" land or (b) of the legal title to the minerals with the equitable title to the minerals under the law of Texas. But we deem this issue of "merger" to be utterly irrelevant here.

For whether or not there was any such "merger" is a question which cannot arise if Mrs. King's will did effectively pass the beneficial interest in the mineral trust. And even if the mineral trust did terminate, whether the minerals were merged with the surface or not is also irrelevant to the validity of the Humble 1933 leases, since if valid these leases conveyed the fee simple determinable mineral title to the lessee, whether previously "merged" or not. We therefore do not discuss the issue of merger here.

What we are pointing out is that the decision appealed from holding the mineral trust terminated on Mrs. King's death is unsustained by reference to merger or by any other valid reasoning or authority. Moreover it is squarely in conflict with the Tule partition decree *in rem*, as we have shown in the prior section of this argument. For obviously the mineral title in 127,000 acres could not have been quieted in Kleberg *as mineral trustee* in 1930 if there were no mineral trust then in full force and effect.

It might also be added that the purported termination of the mineral trust by Kleberg's deed of July 3, 1928, in which he expressed his present "intention to merge the title" of the 29/32nds minerals "with the title to respective (surface) lands, forever free" of the mineral trust (R. 106-8), was utterly inconsistent with the theory that the mineral trust had terminated three years earlier on Mrs. King's death in 1925. If the minerals had merged in the lands automatically on Mrs. King's death, Kleberg *acting as mineral trustee* would certainly not have made the July 3, 1928 deed. The Humble Company in its pleadings attempted to breathe life into this deed by alleging that it substituted the residuary trustees as *successor mineral trustees* to Kleberg under the mineral trust (R. 210). Humble thus admitted: (1) that the mineral trust was still valid on July 3, 1928, and (2) that a successor trustee to Kleberg should be appointed.

The Circuit Court of Appeals squarely rejected both contentions and correctly held that the July 3, 1928 deed was "without effect, for if the trust was in fact and in law continued, Kleberg had no authority to bring it to an end, neither did he have any to appoint substitute trustees. It is quite plain that the residuary trustees did not consider themselves as (successor) mineral trustees." But this

abortive deed, especially when combined with Humble's pleadings, plainly constitutes an admission that the mineral trust survived Mrs. King's death, thus supporting the like estoppel by judgment arising from the Tule partition decree.

Perhaps equally conclusive is Kleberg's continual reference to his own powers under the mineral trust as "coupled with an interest" which appeared in most of the 200 mineral leases and other mineral instruments which he signed while *acting as mineral trustee* under the mineral trust *both before and after* Mrs. King's death (R. 2535-3025). It has always been the law that powers "coupled with an interest" or "coupled with a trust" survive the settlor's (Mrs. King's) death.

Hunt v. *Rousmanier*, 8 Wheat. 174;
Peter v. *Beverly*, 10 Pet. 532;
Taylor v. *Bentham*, 5 How. 233;
Wilson v. *Snow*, 228 U. S. 217.

The Texas cases are similar.

Jones v. *Guy*, 71 S. W. (2) 913;
Cano v. *Cuellar*, 95 S. W. (2) 155;
Broadway v. *Stone*, 15 S. W. (2) 230;
Wiener v. *Zwieb*, 141 S. W. 771;
Slay v. *Gose*, 233 S. W. 348.

We conclude that under the established law of Texas the mineral trust survived Mrs. King's death and that the contrary holdings by the District Court and the Circuit Court of Appeals are erroneous and should be reversed. We cite below the authorities in this Court holding that

the Federal Courts must follow the law of the State of Texas in this case in quieting the title to Texas real estate.

III.

The Circuit Court of Appeals erred in holding that the Humble 1933 mineral leases were valid.

If the foregoing contentions in this brief are sustained, it is obvious that the Humble 1933 mineral leases were invalid because they were not made by the mineral trustee, he having died in 1932 and no successor having been appointed.

It is our further position, however, that even if the residuary trustees had held the mineral title on Sept. 26, 1933, the Humble leases made on that date were invalid as beyond the power of the residuary trustees and as constituting a breach of trust, for the following reasons:

1. The residuary trustees under Mrs. King's will held merely the *general* power to lease or sell the trust estate. Not a drop of oil had been developed on the King Ranch in Mrs. King's lifetime. Under the will, therefore, the residuary trustees held no *special* power to conduct mining operations or to enter into mineral leases and thereby "waste" the minerals.

2. The residuary trustees under Mrs. King's will held the mere *general* power to lease or sell the trust estate, without reference to minerals as such or to mineral leases. There was no *special* power granted the residuary trustees to lease or sell minerals, as in the Humble 1933 leases, upon

royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the trust, thus depriving the beneficiaries of their unclouded fee simple title to the minerals to which they were entitled on March 31, 1935.

Before turning to a consideration of the foregoing matters, we first cite the cases in this Court holding that the Federal Courts must follow and apply the established law of the State of Texas in which the real property here under consideration lies. These cases, with which this Court is so familiar as to require no further comment, include the following:

Erie Railway Co. v. *Tompkins,* 304 U. S. 64;
Ruhlin v. *New York Life Ins. Co.,* 304 U. S. 202;
City Service Co. v. *Dunlap,* 308 U. S. 208;
Klaxon Co. v. *Stentor Elec. Mfg. Co., Inc.,* 313 U. S. 487.

This requirement that the Federal Courts follow the state law is particularly applicable to this case, for not only does the real property here involved lie in the State of Texas, but both Mrs. King's mineral trust and will, and all of the actions of the mineral trustee and residuary trustees thereunder, took place in and are subject to the law of Texas. We discuss the foregoing objections to the Humble 1933 leases in more detail, as follows:

1. It is plain that under the law of Texas the residuary trustee had no authority under Mrs. King's will to enter into the Humble 1933 leases if by so doing waste of the minerals was committed. The authorities are collected and considered in *Avis* v. *First Natl. Bk. of Wichita Falls,* decided by the Supreme Court of Texas on February 24,

1943 and cited to the Circuit Court of Appeals in this case by plaintiffs' supplement to petition for rehearing (R. 3159). This decision was by the Supreme Court of Texas sitting *en banc* with its two Commissions of Appeals to constitute a full court of nine members. We can give no citation to this case because it is still pending before the Texas Supreme Court on petition for rehearing. The opinion is therefore printed as an appendix.

In the *Avis* case "the sole question" was whether the trustee had "power to execute mineral leases on lands held by it as such Trustee." Under the Avis will the trustee had "full, ample, complete, and absolute power to manage, control, sell, and dispose of said trust property, rent, make leases thereon, and in every way handle same." The Supreme Court of Texas held that the power to "make leases" only "applies to ordinary leases, and not to mineral leases"; and that the power to "sell said trust property" only applies to *sales* and "does not include the power to make an oil and gas lease." The Supreme Court concluded:

> "We therefore hold that the First National Bank of Wichita Falls, as Trustee, does not have the power to make a mineral lease on the land held in trust by it. * * * Judgment is here rendered construing this will as above indicated."

The case at bar is much stronger and more compelling than the *Avis* case. Shortly *after* Mrs. King executed her will providing for the future establishment of an ordinary testamentary trust, in which she definitely refrained from giving to her residuary trustees the power to execute mineral leases, Mrs. King executed her mineral trust which was prepared by the same lawyer (R. 832, 3104) in which she conferred plenary authority upon

her mineral trustee to lease or sell their minerals. Her *deliberate* failure, therefore, to confer any power to execute oil and gas leases upon her residuary trustees, followed within a few months by her positive grant of the fullest powers to make oil and gas leases upon her mineral trustee, leaves no room whatever for an implication of powers which were so clearly and intentionally *denied* the residuary trustees and so specifically and intentionally *given* to the mineral trustee. Thus the doctrine of the *Avis* case is much more strongly applicable to Mrs. King's will than to the Avis will.

Before considering the Circuit Court of Appeals' discussion of this case, we point out that in the *Avis* case the earlier Texas authorities to the same effect were cited and relied upon:

Bean v. *Bean*, 79 S. W. (2d), 652;
Thornton Oil & Gas (4th Ed.) Vol. 1, p. 762.

See also:

Lone Acre Oil Co. v. *Swayne*, 78 S. W. 380 (aff'd 86 S. W. 740).
Whitaker v. *Surtees*, 248 S. W. 432;
Midland County v. *Slaughter*, 130 S. W. 612.

This is also the law of the other states:

Ohio Oil Co. v. *Daughetee*, 240 Ill. 361; 88 N. E. 818;
69 L. R. A. 986;
Lanyon Zinc Co. v. *Freeman*, 68 Kans. 691; 75 Pac. 995;
Perry on Trusts, vol. 2, p. 282, § 774;
Williamson v. *Jones*, 43 W. Va. 562; 27 S. W. 410;
In re Hoysradt, 45 N. Y. S. 841;
65 C. J. 664, p. 791;
36 L. R. A. (N. S.) 1108.

The Circuit Court of Appeals, while admitting that the *Avis* case was correctly decided, attempts to distinguish it upon the ground that the making of oil leases would constitute "waste" under the Avis will but not under Mrs. King's will. The reason given is that there is a "conflict between the interest of the life tenant and the remaindermen beneficiaries" under the Avis will which the Circuit Court of Appeals does not find in Mrs. King's will. An examination of the two wills dispels any such notion. Under the Avis will the widow was a tenant for life or for years (in the event of her remarriage); and upon the termination of the tenancy for years by re-marriage the widow was a one-fourth residuary remainderman, the remaining three-fourths being given to the testator's seven children, subject, however, to a gift over to their "natural heirs" under the second paragraph of Article 7 of the will. This was practically identical with the situation under Mrs. King's will. She gave a ten-year annuity to the plaintiffs (and others) with the remainder over to the plaintiffs (and others) subject to divestment to their "living descendants" (and the husband of one) if they did not survive the trust period (R. 75-81).

The effect of the Avis decision was thus to hold that the executory limitation to third persons, i. e., the "natural heirs" of the children under Article 7, was the very basis for the Supreme Court's decision that the trustee must not commit waste as to them. In other words "waste" is defined as anything which *might* injure anyone "who has a right or possibility of future possession" of the estate. Tiffany, Real Property, 2nd ed., p. 950.

Turning to Mrs. King's will, it would equally be "waste" for the residuary trustees to deplete the mineral deposits which the "living descendants" of the remaindermen

might take by way of an executory limitation, precisely similar to the limitation to "natural heirs" in the Avis will. As the Supreme Court of Texas held in the *Avis* case, citing *Williamson* v. *Jones, supra,* and *Ohio Oil Co.* v. *Doughetee, supra,* equity will enjoin a *threatened future waste;* and it is this threat of future waste which puts the lease beyond the trustees' powers on the date upon which it is made.

Certainly it is no answer to the *Avis* case to say that the trustee may commit waste by leasing the minerals because the proceeds of the waste might go to the same persons as the minerals themselves might have gone if there had been no waste. In other words, the remainderman can object to the destruction of his remainder interests by waste *even though at the time the waste is committed he is receiving an annuity from the estate.* Under Mrs. King's will the beneficiaries received annuities which in the case of plaintiffs were limited to $250 per month (R. 71-2). It was utterly unnecessary to waste the minerals in order to pay the annuities (comprising only 4% of the gross income of the estate) under Mrs. King's will. It is not the failure to receive the proceeds of the waste during the period of the trust but the wasting of the remainder interests themselves which is condemned by the Supreme Court of Texas in the *Avis* and other earlier cases.

One more word might, perhaps, usefully be said. The Circuit Court in both its original opinion (R. 3119) and opinion on rehearing (R. 3187) speaks of Kleberg's "controlling voice in the management of the trust" and his "power of final and binding decision as to any of their (the trustees') duties or acts." Kleberg unquestionably had the right to cast the deciding vote in the event of any

"difference of opinion" *between* the trustees (R. 83), but he could not *expand* the *general* powers of the trustees to suit himself thereby. It has always been the law that any clause giving trustees *power to approve their own acts,* especially if inserted in a will by the same attorney who drew it and who made himself a trustee thereunder (in this case James B. Wells), would be against public policy and void. Restatement of the Law of Trusts, Secs. 187(k), 222(d). *Kramer* v. *Sommers,* 93 S. W. (2) 460.

So also defendants' argument that Mrs. King's will gave the residuary trustees the general power to do everything she "would or could do if living" (R. 71), or which an owner similarly situated might do "not inconsistent with the provisions of this will" (R. 81-3), has repeatedly been held *not* to add any *missing special powers* to the will. *In re Ruggles Estate,* 266 N. W. 332; *In re Hall's Estate,* 216 N. Y. S. 598; *In re Andrus Will,* 281 N. Y. S. 831.

We contend therefore:

(a) That under the established law of Texas the residuary trustees had no power to enter into the Humble 1933 mineral leases; and

(b) That under the decisions of this Court the Federal Courts are bound to apply this law of the State of Texas to Mrs. King's will in quieting the title to Texas realty.

It follows that the decision affirmed by the Circuit Court of Appeals should be reversed on this ground.

2. It is the settled law of Texas that the mere *general* power to lease or sell the trust estate does not give the trustees the *special* power to lease or sell minerals or other realty upon royalties, rentals or installments pay-

able for 18½ years and possibly on in perpetuity beyond the termination of the trust.

Wisdom v. *Wilson*, 127 S. W. 1128;
Vernon's Ann. Civ. Stat., Art. 4192(5);
Pure Oil Co. v. *Clark*, 40 S. W. (2d) 962;
Rogers v. *Harris*, 171 S. W. 809;
Restatement of Law of Trusts, § 189;
Scott on Trusts, § 189.2.

The cases in other jurisdictions sustaining the same rule are legion:

In re Armory Board, 60 N. Y. S. 882;
In re Hubbell Trust, 113 N. W. 512;
Wilmington Tr. Co. v. *Carrow*, 125 Atl. 350;
St. Louis Union Tr. Co. v. *Van Raalte*, 259 S. W. 1067;
Russell v. *Russell*, 145 Atl. 648;
North v. *Augusta Real Est. Asso.*, 155 Atl. 36;
In re Caswell's Will, 222 N. W. 235;
South End Warehouse v. *Lavery*, 107 Pac. 1008;
Hunt v. *Lawton*, 245 Pac. 803.

In the event the trustee does make a lease extending beyond the trust period, the beneficiaries need only bring an action to terminate that portion of the lease after the trust has ended and the court will promptly grant the beneficiary the relief sought. *In Re McCaffrey's Est.*, 3 N. Y. S. 96; *In Re Opening of 110th Street*, 81 N. Y. S. 32; *Cox* v. *Kinston Carolina Lbr. Co.*, 95 S. E. 623.

The Texas case of *Wisdom* v. *Wilson*, 127 S. W. 1128, is peculiarly applicable because in that case the trustee had a discretionary power of *sale* and attempted to *sell* the real estate upon deferred payments extending beyond the

trust term. The Texas court held that the sale was invalid, citing Perry on Trusts, § 786, which reads:

> "The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be made for cash."

The Texas court condemned the sale on instalments because the beneficiary would have to accept his property burdened with this transaction, in effect prolonging the trusteeship and depriving him of his right to a reasonably prompt settlement and distribution as the testator intended. *That is precisely the situation here.*

This case disposes of the defendants' contention that mineral leases are really "sales" and not leases; for it matters not whether they are sales upon installments or leases upon rentals or royalties, they are equally condemned under the Texas law.

Numerous other Texas cases have held that leases by a guardian beyond the termination of his ward's minority are voidable as to the portion beyond the date of the ward's coming of age.

Pure Oil Co. v. *Clark*, 40 S. W. (2d) 962;
Rogers v. *Harris*, 171 S. W. 809;
Jackson v. *O'Rorke*, 98 N. W. 1068;
Vernon's Ann. Civ. Stat., Art. 4192(5).

In the case of Mrs. King's will it was unquestionable that the residuary trust had no more than 18 months to run when the Humble leases were made on Sept. 26, 1933. Nevertheless these leases contain a binding preliminary term of 20 years, which therefore extended the leases a *minimum* of 18½ years beyond the termination of the trust. If minerals were discovered and developed during

the primary term, the lease permitted the Humble Company to maintain them on the area under production in perpetuity so long as oil should be produced therefrom.

That this is squarely in violation of the Texas law and that the decisions of this Court require the Federal Courts to follow the Texas law in this respect appear to be beyond controversy.

We conclude that this Court has jurisdiction and that the decisions below should be reversed on this ground.

CONCLUSION.

We conclude, therefore:

1. That the courts below failed to give "full faith and credit" to the Tule partition decree *in rem* by failing to decree the mineral title in 127,000 mineral acres here involved to be in Kleberg and his successors *as mineral trustees* under Mrs. King's mineral trust, and also by failing to give the Tule decree the effect of an estoppel by judgment as to the continued validity of the mineral trust after Mrs. King's death.

2. That the courts below failed to follow the settled law of the State of Texas by failing to hold that Mrs. King's will effectively disposed of the beneficial interest and designated the uses, purposes, and beneficiaries under the mineral trust.

3. That the courts below failed to follow the established law of Texas as settled by the *Avis* and other Texas decisions by failing to hold that the mere *general* power to lease and sell the trust estate did not give the residuary

trustees under Mrs. King's will the *special* power to enter into the Humble 1933 mineral leases which constituted waste of the estate.

4. That the courts below failed to follow the established law of Texas by failing to hold that the mere *general* power to lease or sell real estate did not give the residuary trustees under Mrs. King's will the *special* power to enter into the Humble 1933 mineral leases providing for the payment of rentals and royalties for a minimum of 18½ years and possibly on in perpetuity beyond the terms of the residuary trust.

Petitioners therefore pray that the decree of the District Court as affirmed by the Circuit Court of Appeals for the Fifth Circuit should be reversed and that this Court should grant the Writ of Certiorari herein prayed.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

APPENDIX.

Vernon's Texas Statutes, 1936, Art. 6085:

"*Where defendant is unknown.*—If the plaintiff, his agent or attorney, at the commencement of any suit, or during the progress thereof, for the partition of land, shall make affidavit that an undivided portion of the land described in the plaintiff's petition in said suit is owned by some person unknown to affiant, the clerk of the court shall issue a citation to the proper officer, which shall contain a brief statement of the nature of the suit, and a description of the interest of the unknown owner or owners, commanding such officer to summon such unknown owner or owners by making publication of the citation in some newspaper in the county where the writ issued, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, for four successive weeks previous to the return day of such process. When such notice is given, and no appearance is entered within the time prescribed for pleading, the court shall appoint an attorney to defend in behalf of such owner or owners, and proceed as in other causes where service is made by publication. It shall be the special duty of the court in all such cases to see that its decree protects the rights of the unknown parties thereto. The judge of the court shall fix the fee of the attorney so appointed, which shall be entered and collected as costs against said unknown owner or owners. (Acts 1879, p. 46; G. L., vol. 8, p. 1346.)"

Vernon's Texas Statutes, 1936, Art. 6100:

"*Decree shall vest title.*—The decree of the court confirming the report of the commissioners in partition, when a partition has been made shall vest the title in each party to whom a share has been allotted, to such share as against the other parties to such partition suit, their heirs, executors, administrators or assigns, as fully and effectually as the deed of such parties could vest the same, and shall have the same force and effect as a full warranty deed of conveyance from such other parties and each of them. (Id.)"

Avis et al. v. First National Bank of Wichita Falls.

No. 8025

(Supreme Court of Texas)

Tried in Wichita County and brought to the Supreme Court by writ of error from the Second District Sept. 30, 1942.

This suit was brought for the purpose of construing a will and to determine the powers of the testamentary trustee, the Bank respondent, with respect to executing mineral and other leases on lands belonging to the estate. The trial court's judgment accorded such authority to the trustee under the will, and this judgment was affirmed by the Court of Civil Appeals. In this opinion by Justice Sharp, delivered by the Supreme Court February 24, 1943, both of these judgments are reversed and rendered in accordance with the construction given the will.

For Petitioners: Weeks, Hankerson & Surles and Russell Surles, Tyler.

For Respondent: Kilgore & Rogers, Wichita Falls.

Wills—Trustees—Oil and Gas Leases.

A testamentary Bank trustee under a will given "full, ample, complete and absolute power to manage, control, sell and dispose of * * rent, make leases thereon and in every way handle same" is held not to have had the power to execute oil and gas leases on lands owned by the estate, in the absence of an express provision therefor, and courts are not justified in writing into his will language the testator did not see fit to use therein.

JUSTICE SHARP: This suit was brought by the First National Bank of Wichita Falls, as testamentary trustee, to have construed the last will of J. D. Avis, deceased. The beneficiaries under the trust created by the will and the ultimate beneficiaries after the trust ended, in so far as they were at the time of the suit in being, together with the wives and husbands of such beneficiaries, were made party defendants. The only question involved is whether or not the language of the will creating the trust empowered the testamentary trustee to execute and deliver mineral leases, specifically oil and gas leases, on the land belonging to the trust estate. Some of the defendants contested the power of the trustee to make such leases. The trial court, acting without a jury, construed the will as giving the trustee bank "plenipotentiary" powers, including the authorization "to execute, acknowledge and deliver mineral leases and mineral leasehold estates upon lands belonging to said trust estate." The defendants appealed, and the Court of Civil Appeals affirmed the judgment of the trial court. 162 S. W. (2d) 1072.

J. D. Avis executed his will on November 16, 1931, and died on September 29, 1935. The will was admitted to probate in Wichita County on the 2d day of November,

1935. The pertinent parts of such will relating to the question before us are as follows:

Paragraph No. 2 of the will appoints the First National Bank of Wichita Falls, Texas, "my independent executor and trustee, under this my last will and testament, and as such executor, I give to said First National Bank of Wichita Falls, Texas, the full and ample powers conferred upon it as Trustee," and provides that no security or bond be required in either capacity, and provides for independent administration. In case of the Bank's refusal or failure to act, it provides for the appointment of a substitute trustee, who shall give bond, and thereupon succeed to all of the rights of the original trustee. We quote from the will the following:

"3.

"I hereby give, devise and bequeath all of my property, real personal and mixed of every kind and character, of which I may die seized and possessed, after the payment of my just and lawful debts, unto said First National Bank of Wichita Falls, Texas, as trustee, and unto its successor in this trust, for the uses, purposes and trusts hereinafter specified; and I hereby direct that all of said property together with any changes or accretions thereto, shall be held, used, managed, disposed of, sold, disbursed by said trustee, according to the further terms of this will; and I do hereby grant to said trustee full, ample, complete and absolute power to manage, control, sell, and dispose of said trust property, rent, make leases thereon, and in every way handle same, subject only to the express limitations hereinafter contained."

"4.

"I hereby declare that all of the property that I now own or possess is the community property of my self and

my wife, Minnie Ola Avis, with the exception of the following, viz.: seventy shares of stock in the First National Bank of Wichita Falls, Wichita County, Texas; and twenty-five shares of stock in the First National Company of Wichita Falls, Texas, is separate property, having been purchased with money received directly from my mother's estate; the property situated at the corner of ninth and Burnett in the City of Wichita Falls, being 150 feet by 200 is also separate property, I having received it directly from my mother's estate."

"5.

"I hereby direct that immediately upon my death, that my trustee herein appointed, shall take full and complete charge of my estate, attend to the probating of this will, and pay my debts and funeral expenses. After that is done, I direct that my trustee shall keep the corpus of my estate intact, if possible, and so far as practical, until the death of my wife, subject to the provision hereinafter contained with reference to her remarriage; and shall pay over to said Minnie Ola Avis, the entire net income from my estate during her lifetime, and as often and at such times as the receipt of income from said estate will justify and shall be deemed expedient by my trustee, but preferably monthly, or quarterly, it being my desire that my said wife shall have ample funds at all times."

"6.

"In the event that my wife should remarry, after my decease, then I direct that my said trustee shall make an immediate settlement of my entire estate, by setting over or paying to my wife, one-fourth of same, the other three-fourths to be immediately distributed equally between our seven children, F. P. Avis, J. D. (Dave) Avis, Jr., A. W. (Jake) Avis, Mrs. W. F. Weeks, Mrs. H. S. Baum, Mrs.

W. U. McCutchen and Mrs. Ralph Dunkelberg, the said trustee being fully empowered to make such disposition of my estate as will enable it to make fair division, giving one-fourth to my wife, and the other three-fourths equally to the children."

"7.

"But if my wife shall survive me, and shall not remarry, then at her death, I direct that said estate shall be immediately divided by said trustee, among my children, above named, in equal proportions.

"And in connection with any division of my estate among my children, I direct that if any of my children above named shall at that time have died, then said trustee shall pay over to that child's natural heirs, that child's portion of my estate; and if that child having died, left no natural heirs, then said portion to be divided equally among the living children, or their natural heirs."

"10.

"There shall be no liability on said trustee for loss resulting from the administration of this trust, except such as occurs through wilful neglect of said trustee, but I admonish such trustee to handle said property as discreetly as it has heretofore managed its own business for many years past."

The inventory of the estate, filed in connection with the probate of the will, showed debts in the amount of something over $24,000.00. The pleadings and the testimony at the time of the trial showed that all of the indebtedness had been or was at that time being paid. For that reason, whatever power the Bank now has is by virtue of its power as trustee, rather than as executor. The evidence

adduced at the trial shows that J. D. Avis was a stockholder and customer of the bank and a personal friend of its officials. It also shows that there was at the time of the making of the will, and there had been for many years prior thereto, more or less oil-leasing activity in and around Wichita Falls, though only to a limited extent in the county where the land now belonging to the estate is located.

J. D. Avis at the time of making his will, and at the time of his death, and for a long time prior thereto, was a citizen of Wichita Falls. He was a shrewd business man, and accumulated quite an estate, and he selected the Bank as independent executor and trustee to handle his estate. It is undisputed that no oil and gas lease has been executed by the trustee on the land in question. The debts owed by the estate have been fully paid. The testator's wife is living and has never remarried. As we understand the record, it is not contended that the wife is not supplied with ample funds at all times. The sole question presented for determination is whether, under the terms of the will made by J. D. Avis, the First National Bank of Wichita Falls, as trustee, has the power to execute mineral leases on lands held by it as such trustee.

The primary rule governing the construction of wills is to ascertain the intention of the testator. This intention should be, if possible, gathered from the instrument itself. Furthermore, in order to ascertain the intention of the testator expressed in the will, the language used therein may be construed in connection with the surrounding facts and circumstances existing at the time the will was made. *Hassell et al.* v. *Frey et al.*, 131 Tex. 578, 117 S. W. (2d) 413; *Wallace et al.* v. *First Nat'l Bank of Paris,*

120 Tex. 92, 35 S. W. (2d) 1036; *Federal Land Bank of Houston* v. *Little* (Tex. Com. App.), 107 S. W. (2d) 374.

Now let us look at the will to ascertain the intention of the testator. The testator acknowledged that all property owned or possessed by him was community property of himself and wife, with certain exceptions described in paragraph No. 4 of the will. Since the following language used in the will forms the basis for the contention made that the trustee has the power to execute an oil and gas lease on the land held by it as trustee, we quote from the will the following:

"I hereby direct that all of said property together with any changes or accretions thereto, shall be held, used, managed, disposed of, sold, disbursed by said trustee, according to the further terms of this will; and I do hereby grant to said trustee full, ample, complete and absolute power to manage, control, sell, and dispose of said trust property, rent, make leases thereon, and in every way handle same, subject only to the express limitations hereinafter contained."

The express limitations contained in said will are as follows: (1) That all of his debts and funeral expenses be paid; (2) that the trustee shall keep the corpus of the estate intact, and that his wife shall be paid certain sums as provided for in paragraph 5; (3) that in the event his wife should remarry, his estate shall be divided as provided in paragraph 6; and (4) that in the event his wife should survive him and not remarry, then at her death provision is made for the division of the estate in paragraph 7.

Counsel for both petitioners and respondent concede that the language used in the will empowering the trustee

to rent such property and make leases thereon applies to ordinary leases, and not to mineral leases. This agreement is in accord with the decisions. *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108; *Lanyon Zinc Co.* v. *Freeman et al.,* 68 Kan. 691, 75 Pac. 995; 1 Ann. Cas. 403; Bogert on Trusts, Vol. 4, p. 2310, § 798, Ibid., p. 2415, § 828; see also *Smith et al.* v. *Womack et al.,* 231 S. W. 840 (writ dismissed). We therefore must look to the other language used in such will to see if it authorizes such trustee to execute an oil and gas lease.

When this will was made, certain fundamental rules relating to the power of a trustee to execute mineral leases prevailed. We will state some of them, and they are as follows: (1) It is generally accepted as a sound rule that a power to sell expressed in an instrument does not include the power to make an oil and gas lease. *Bean* v. *Bean,* 79 S. W. (2d) 652 (writ refused); 49 C. J., p. 1272, § 72; Perry on Trusts, Vol. 2, p. 282, § 774. (2) A testamentary trustee, holding land in fee in trust to pay the entire net proceeds to a beneficiary for life, with remainder to his heirs, holds it for the benefit of the remainderman as well as the life tenant, and, in the absence of language authorizing such trustee to make mineral leases, he is not authorized to grant the right to take the gas and oil from the property where no wells were open on the property at the time of the creation of the trust. *Ohio Oil Co.* v. *Daughetee, supra; Williamson* v. *Jones,* 43 W. Va. 562, 27 S. W. 410, 64 Am. St. 891, 38 L. R. A. 694; Thornton, Oil & Gas (4th ed.), Vol. 1, p. 762. See also *Lanyon Zinc* v. *Freeman et al., supra;* Bogert on Trusts, Vol. 4, pp. 2309-12, § 798. (3) The drilling of new oil wells on land in the interest of a life tenant is waste against the remainderman, which may be enjoined. Thorn-

ton, Oil & Gas (4th ed.), Vol. 1, p. 762; *Ohio Oil Co.* v. *Daughetee, supra; Williamson* v. *Jones, supra.*

The case of *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108, involved the construction of a will wherein the testator devised and bequeathed to a trustee in trust "all my estate, real, personal, and mixed, of whatever kind or nature soever, of which I may die seized or possessed, to have and to hold, manage, rent lease, and control, in trust, for the uses and purposes following:" It was contended in that case that the trustee had the right to execute an oil and gas lease under the terms of the will, and in the course of the opinion the Supreme Court of Illinois said:

"Granting that the trustee held the title in fee, he held it for the benefit of the remainderman as well as the life tenant, and had no right to waste the estate for the benefit of the life tenant, at the expense of the remainderman. It is a well-established rule of law that the opening of new mines upon land by a life tenant amounts to waste. *Priddy* v. *Griffity,* 150 Ill. 560, 41 Am. St. Rep. 397, 37 N. E. 999. The same rule applies to oil wells. Oil is a mineral and part of the realty. Owing to its fugitive nature, a grant of oil under the ground is a grant, not of the oil in place in the earth, but of such oil as the grantee may find there and save. The right to go upon the land and remove all the oil, if of unlimited duration, is a freehold estate (*Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Bruner* v. *Hicks,* 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888), and a grant of such right is therefore in legal effect a sale of a portion of the land (*Blakley* v. *Marshall,* 174 Pa. 425, 34 Atl. 564, 18 Mor. Min. Rep. 350; Stoughton's Appeal, 88 Pa. 198). There were no oil wells on the land at the time of the tes-

tatrix' death. A tenant for life under such circumstances would have had no right to operate for oil on the land. *Marshall* v. *Mellon,* 179 Pa. 371, 35 L. R. A. 816, 57 Am. St. Rep. 601, 36 Atl. 201, 18 Mor. Min. Rep. 548. Neither could the trustee operate for his benefit. The taking out of the oil would be waste, which a court of equity will enjoin. *Williamson* v. *Jones,* 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19."

The precise question presented here, so far as we can ascertain, has never been determined by this Court. The case of *Jackson* v. *Templin* (Tex. Com. App.), 66 S. W. (2d) 666, involved the power of a testamentary trustee to mortgage certain property belonging to the estate held by him as such trustee. The testamentary trustee was given "full power to rent or sell any of said trust property, as may seem best." The trustee was to provide for the "comfortable maintenance" of the daughter of the testator out of "income" from the property. It was held in that case that the trustee did not have the right to mortgage such property.

The case of *Bean* v. *Bean,* 79 S. W. (2d) 652 (writ refused), involved the language contained in a power of attorney to an attorney in fact, which gave him the right "to bargain, sell, grant and convey" certain lands. It was contended in that case that the attorney in fact had the power to make an oil and gas lease. The courts held to the contrary.

It is undisputed that the testator was a shrewd and successful business man, and that he lived in Wichita Falls and transacted business there, where the oil industry had been long established. It also appears that he was careful in the selection of the trustee to handle his estate, and was equally careful in placing in his will certain terms that had been construed by the courts in many cases. He

knew the history of the oil development in that part of the State and the importance of an oil and gas lease. It is significant that in the powers conferred on the trustee he did not authorize such trustee to execute oil and gas leases. The terms of his will are clear and unambiguous, and appear to have been carefully selected to express his wishes. If in the exercise of his meticulous care in preparing his will he did not desire to express the wish that the trustee should have the power to execute oil and gas leases, then certainly courts are not justified in writing into his will language that he did not see fit to use therein. The development of oil and gas has become an important industry in this State, and if a testator wants a trustee to execute an oil and gas lease on his property he can, with little trouble, say so in his will. It may have been sound business judgment for the testator to have authorized the trustee to execute an oil and gas lease if the trustee deemed it to the best interests of the estate to do so, but the property belonged to the testator, and he had the right to decide upon what terms same was to be handled by the trustee. The question was left solely to the testator to determine before he made his will, and the courts will be bound by his judgment. We have no right to substitute our judgment for his in order to control the construction of his will. *Adams* v. *Mauermann*, 90 Tex. 438, 39 S. W. 280. We therefore hold that the First National Bank of Wichita Falls, Texas, as Trustee, does not have the power to make a mineral lease on the land held in trust by it.

For the reasons above stated, the judgments of the Court of Civil Appeals and the District Court are both reversed, and judgment is here rendered construing this will as above indicated.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 140

EDWIN K. ATWOOD, ET AL., *Petitioners,*

v.

ALICE G. K. KLEBERG, INDIVIDUALLY AND AS EXECUTRIX, ETC., ET AL., *Respondents*

BRIEF OF RESPONDENT

Humble Oil & Refining Company in Opposition

R. E. SEAGLER,
Attorney for
HUMBLE OIL & REFINING COMPANY, *Respondent*

E. E. TOWNES,
MAJOR FELIX A. RAYMER,
Of Counsel

ALPHA LAW BRIEF CO., HOUSTON

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BRIEF OF RESPONDENT

Humble Oil & Refining Company in Opposition to Petition for Writ of Certiorari

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This respondent is interested in the mineral leases under attack by petitioners in their third and fourth questions presented in their petition and brief in support thereof. Peti-

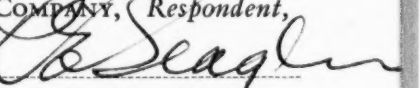
tioners ask for the cancellation of certain oil, gas and mineral leases, as well as mortgage and notes executed to this respondent by the executors and trustees of Henrietta M. King's estate. Their contention is that the executors and trustees were without authority to effectually execute such instruments under the powers granted in the will of Mrs. King. The principal complaint of petitioners is that the courts below failed to follow the decisions of the Supreme Court of Texas on the points here involved, and in this connection cite and rely upon the recent case of AVIS v. FIRST NATIONAL BANK OF WICHITA FALLS, originally decided by the Supreme Court of Texas on February 24, 1943. After petitioners filed their petition and brief in this court, the Supreme Court of Texas granted a rehearing in the AVIS case, withdrew its original opinion, and reversed the holding it had theretofore made, and in its final opinion sustained the power of the trustee to make mineral leases under the power of sale and general disposition granted to the trustee in the Avis will. It thus appears that the Supreme Court of Texas has destroyed petitioners' contentions and argument against the mineral leases here involved. A copy of the opinion of the Supreme Court of Texas on motion for rehearing in the AVIS case is set out in the appendix to the brief on behalf of respondents Alice G. K. Kleberg, et al., in opposition to the petition for writ of certiorari.

Counsel for respondents Alice G. K. Kleberg, et al., in their brief have fully answered all contentions of petitioners concerning the mineral leases under attack, and this respondent here adopts the brief of respondents Alice G. K. Kleberg, et al., filed herein, in so far as the same deals with the legal and factual points which sustain the validity of the mineral leases, mortgage and notes held by this respondent. Obviously this respondent is not affected by other issues raised by the petition for writ of certiorari.

This respondent respectfully prays that the petition be denied.

Respectfully submitted,

HUMBLE OIL & REFINING COMPANY, *Respondent*,

By 

R. E. Scagler, *Attorney*,
437 Humble Building,
Houston 1, Texas

E. E. TOWNES,
Houston, Texas;

MAJOR FELIX A. RAYMER,
Fort Sam Houston, Texas,
Of Counsel

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 140

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITIONERS' REPLY BRIEF TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

U. S. Law Printing Co., Phone Lakeview 6581, Chicago, Illinois

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 140

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITIONERS' REPLY BRIEF TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents Alice G. K. Kleberg, et al., and Humble Oil & Refining Company have filed their Briefs herein, the latter adopting the Brief of the former in so far as the validity of the mineral leases is concerned.

We discuss each of the three issues considered by the Respondents' Briefs as follows:

1. The effect of the Tule (MacManus v. Anzualda) decree in rem as res judicata of the title to 127,000 mineral acres in Hidalgo and Cameron Counties, Texas.

Respondents say that the partition decree entered July 21, 1930 in the San Salvador del Tule Grant partition suit is not *res judicata* of the title to the 127,000 mineral acres there adjudicated to Robert J. Kleberg, Sr. as mineral trustee and is not a decree *in rem* binding upon the world because:

(a) Kleberg as mineral trustee was not "in fact" a party to the Tule partition suit because "an attempted intervention" was filed by his attorneys without his "authorization or knowledge," or that of the testamentary trustees under Mrs. King's Will who were represented by the same attorneys.

(b) Kleberg "could not litigate the issue" as to whether the mineral trust then existed "on account of lack of opposing parties."

(c) The beneficiaries under Mrs. King's Will were not parties to the Tule partition suit nor "in privity with them," wherefore the partition decree was not binding upon the beneficiaries.

(d) The Tule partition decree does not interpret the mineral trust "or supply any of its defects," because the Tule partition decree "vested merely the naked legal title without any power of disposition" in Kleberg as mineral trustee and "vested all of the remainder of the title to the 29/32 mineral interest in the testamentary trustees, to be dealt with by them unimpeded by any active mineral trustee."

Petitioners respectfully urge that there is no validity to any of these contentions, as we now proceed to show:

(a) It is admitted by respondents that Kleberg as mineral trustee intervened in the Tule partition suit (by Edward R. Kleberg and J. K. Wells, his attorneys). The intervention petition appears on pages 2743-53 of the Record. It was filed by "Robert J. Kleberg, Sr., Individually and in his capacity as Trustee under a certain Power of Attorney Coupled with an Interest and Declaration of Trust hereinafter more particularly set out and described, and with leave of the Court first had and obtained" (R. 2743), and it was signed "Robert J. Kleberg, Sr., by Edward R. Kleberg and J. K. Wells, his attorney(s)" (R. 2745). Attached as "Exhibit A" to the petition was the March 1, 1919 Mineral Trust (R. 2746-53).

The Record abundantly shows that Edward R. Kleberg and J. K. Wells were attorneys at law for Robert J. Kleberg, Sr., as mineral trustee. Mr. Marcellus G. Eckhardt, Jr. testified that he was an attorney associated with Edward R. Kleberg subsequent to 1926. He testified on page 3109 of the Record: "I do know that Mr. (Edward R.) Kleberg was active as an attorney in advising with some of the attorneys for the Estate (of Mrs. H. M. King) in that (Tule) land suit."

Robert J. Kleberg, Sr. was dead at the time this case was tried in the District Court, his death having occurred on October 10, 1932. The rules governing the decision of an issue as to whether attorneys, who have entered the appearance of a deceased client, did so with full authority are well settled under Texas law. The Texas cases hold that an attorney is conclusively presumed to have authority to represent and act for his client, and that full authority will be presumed on collateral attack.

Holder v. *State*, 29 S. W. 793;
Hidalgo County District v. *Magnolia*, 47 S. W. (2) 875;
Patterson v. *Rogers*, 53 Tex. 484.

It is equally well settled under Texas law that a party to a suit is conclusively deemed to know the contents of all pleadings and orders and especially of the final judgment.

31 Texas Jurisprudence 372;
Deutschmann v. *Ryan,* 148 S. W. 1140;
Hacker v. *Hacker,* 110 S. W. (2) 923;
West Lumber Co. v. *Lyon,* 116 S. W. 652;
Walet v. *Haskins,* 68 Tex. 418, 421.

The respondents' argument that Robert J. Kleberg, Sr. neither authorized nor had any knowledge of his own intervention by his own attorneys in the Tule partition suit in his capacity as mineral trustee was not supported by any evidence in the Record whatever. Neither Edward R. Kleberg nor J. K. Wells (his attorneys) was called to testify; and Robert J. Kleberg, Sr. had already died without giving any testimony in this case. No Record references were made by respondents to any such proofs for the simple and obvious reason that no such evidence exists in this case.

Respondents' argument appears to be that Kleberg, Sr. as mineral trustee did not authorize or have knowledge of the transactions of his attorneys merely because it appears from the Tule, partition decree that the same attorneys undertook to represent other parties to the proceeding. This is a complete *non sequitur.* In partition proceedings it not infrequently occurs that one attorney or firm of attorneys will represent several of the respective owners in the land subject to partition. This was pre-eminently so in the case of the Tule partition suit. A certified copy of the Final Partition Decree has been transmitted to this Court from the Circuit Court of Appeals; and a glance at this final decree will conclusively

show that many of the attorneys in that action represented various claimants in the Grant, all of whom were made defendants and whose interests were adverse in the same sense in which Robert J. Kleberg's interests as mineral trustee in the 127,000 mineral acres were adverse to all other parties claiming therein.

In other words there is no foundation in this case for the legal conclusion drawn by respondents that Robert J. Kleberg, Sr., as mineral trustee was not properly represented in that capacity in the Tule case and was not properly decreed to be the owner of the 127,000 mineral acres in the Final Partition Decree itself.

It may be true, as respondents urge on page 5 of their Brief, citing two Supreme Court cases, that a judgment of a state court can be collaterally attacked in the Federal Court for want of jurisdiction over the person of a defendant; but it has never been held, when the client is dead and the attorneys who have represented him are not called to testify, that somehow it may be presumed, in the total absence of any proof and as a matter of law, that the client gave no authorization and had no knowledge of the proceedings taken in his name and on his behalf by his attorneys in said proceedings. If this were the law, any decree could be collaterally attacked by the simple device of denying, without proof, that the client authorized or knew of his attorney's actions and representation in the case.

(b) Respondents' argument that Kleberg as mineral trustee could not litigate an issue with himself as residuary trustee, and that there was therefore a "lack of opposing parties," certainly cannot be sustained. None of the authorities cited in respondents' Brief (p. 6) so

holds. The first four cases there cited held that a *guardian* could not litigate his individual rights in the property of his wards *without another representative of the minors being made a party to the proceedings.* The balance of respondents' authorities discuss the question of jurisdiction over the persons of the parties to the judgment. No such issue was raised here, where Kleberg as mineral trustee intervened by his own attorneys to claim 127,000 mineral acres as against many other defendants, including seven co-trustees under Mrs. King's Will (one of whom was himself), who had likewise intervened by their attorneys in the same proceedings and were claiming the "surface" title to the same lands from which the minerals had been severed and conveyed eleven years earlier to Kleberg as mineral trustee. In other words, Kleberg as mineral trustee was claiming *minerals;* whereas the seven testamentary trustees (including Kleberg) were claiming "surface" lands *without minerals,* all in the same grant. A clearer showing of "adversary parties" could hardly exist.

(c) Respondents' contention that the beneficiaries under Mrs. King's Will were not in privity with the parties to the Tule partition suit cannot be sustained. Mrs. King during her lifetime, and her residuary trustees after her death, and Kleberg as the mineral trustee of her minerals were all parties to the Tule partition proceedings and final decree; and obviously all of the beneficiaries under Mrs. King's Will were in privity with her and her representatives.

The statement that Mrs. King's heirs are necessary parties to a suit involving title to real estate under Article 1982 of Texas Revised Statutes, and that her executors and trustees alone could not bind the heirs, cannot be sustained under the law of Texas.

Article 1982 of Texas Revised Statutes provides that "In every suit against the estate of a decedent involving the title to real estate, the *executor or administrator,* if any, and the *heirs* shall be made parties defendant." (Italics supplied.) But there is nothing in the statute about *"trustees."*

Petitioners have already cited *Village Mills Co.* v. *Houston Oil Co.,* 186 S. W. 785 and *Lipsitz* v. *First Natl. Bk.,* 288 S. W. 609 which hold that a decree binding upon a trustee with title *also binds all beneficiaries under the trust in a partition suit,* even though the beneficiaries are *not* made parties thereto. We also have pointed out that the Circuit Court of Appeals held that the residuary trustees had power to enter into the Humble 1933 leases, which could only have been upon the theory, acquiesced in by all of the respondents, that the beneficiaries were in privity with the residuary trustees and were bound by the residuary trustees' actions in relation to the title to the minerals, even though they did not themselves join therein.

The cases cited by respondents construing Article 1982 are in no way in conflict with our views.

Equally ineffective are the cases holding that beneficiaries of a trust or will are necessary parties in a suit to *construe* the same. The Tule partition decree did not *construe* either Mrs. King's Will or the mineral trust. The construction of these documents not being involved in the Tule case, petitioners certainly are not in the attitude of asserting that the Tule partition decree was *res judicata* as to the meaning, terms or effect of either Mrs. King's Will or mineral trust.

Respondents cite (p. 8) three cases holding that *owners of record* are not "unknown owners" or "unknown

heirs'' within the meaning of the Texas statute on publication service. The beneficiaries were *not* owners of record, and therefore *were* ''unknown owners.'' Kleberg as mineral trustee was *the only record owner* of the minerals after the March 1, 1919 Mineral Trust had been recorded, eleven years before the Tule partition decree was rendered on July 21, 1930; and the testamentary trustees under Mrs. King's Will were *the only record owners* of the ''surface'' lands in the Tule Grant after formal probate of Mrs. King's Will in 1925. This was the situation when the Tule partition decree was entered on July 21, 1930. These cases, therefore, cannot assist the respondents. ''Unknown owners'' have always been deemed to be those who are *not owners of record* in the chain of title to the land.

Respondents again urge that the Tule partition decree did not adjudicate the effect of, supply any of the defects in, or state any term for, the mineral trust. All of this is admitted by petitioners. The Tule decree adjudicated the fee simple title to 127,000 mineral acres in Kleberg as mineral trustee under the mineral trust; and it left to other litigation the determination of the meaning, terms and effect of the mineral trust as between the several beneficiaries thereunder.

(d) Finally respondents say that the effect of the Tule decree was to vest in Kleberg as mineral trustee ''merely the naked legal title without any power of disposition,'' ''all of the remainder of the title to the 29/32 mineral interest'' being vested in the testamentary trustees.

There is not the slightest foundation in the language of the Tule partition decree to support this contention. The Tule partition decree squarely adjudicated the fee simple

title to the 127,000 mineral acres to be owned and held by Kleberg as mineral trustee (R. 514-7), and perpetually enjoined and restrained all other persons from asserting "any right or title acquired prior to the date hereof" (July 21, 1930) (R. 515). The decree likewise adjudicated clear fee simple title to the "surface" lands ("minus" the minerals) in the seven residuary trustees under Mrs. King's Will "and those hereafter claiming or to claim by, through, or under them," likewise perpetually enjoining and restraining anyone from asserting any adverse right or title thereto.

Whether the mineral trust was valid and active, and was therefore not "dry," was not adjudicated by the Tule partition decree. The Record plainly shows on this point that Kleberg as mineral trustee conducted a most active trust between 1919, when the mineral trust was created, and 1925 when Mrs. King died. He made over two hundred (200) mineral leases during those six years, all with Mrs. King's knowledge, consent and approval. The mineral trust was anything but "dry"; indeed it was extremely active. This, however, is beside the question as to the effect of the Tule partition decree as a decree *in rem* establishing the fee simple title to the 127,000 mineral acres in the mineral trustee, and its binding effect upon the world as *res judicata* of all other adverse claims therein.

In conclusion petitioners urge that the very nature and number of the respondents' attacks upon the Tule partition decree serve rather to strengthen its validity than to weaken or impair the same.

2. The continued existence of the mineral trust after Mrs. King's death.

Respondents appear to have ignored the effect of the Tule partition decree in 1930 as an *estoppel by judgment* and its consequent impeachment of the contradictory holding of the Circuit Court of Appeals that the mineral trust had previously terminated in 1925. Apparently respondents agree with our contention that if the Tule partition decree were valid and effective to vest the fee simple title to the 127,000 mineral acres in Kleberg as mineral trustee in 1930, it must have been equally effective as an *estoppel* against the trustees under Mrs. King's Will, and all of the ultimate beneficiaries who were in privity with the trustees, to deny the continued existence of the mineral trust to 1930 and thereafter for the "full term of FIFTY (50) YEARS from this, the First (1) Day of March, A. D. 1919."

This brings us to the second question considered in the respondents' brief: Did Mrs. King's Will name the beneficiaries to take under the mineral trust, thereby preventing the termination of the mineral trust for want of beneficiaries on Mrs. King's death in 1925?

Respondents have ignored our discussion of the error committed by the Circuit Court of Appeals in refusing to follow the Texas law of severance in regard to minerals, and in holding that the mineral trust terminated on Mrs. King's death for failure of Mrs. Kings' Will to pass the beneficial interest under the mineral trust.

All that respondents say on this subject is that the Circuit Court of Appeals "correctly held that the mineral trust was not in existence at the time of her (Mrs. King's)

death." Respondents then proceed to discuss the question as to whether the mineral interests were real estate and whether they passed under the specific devises of land or as residuary property under Mrs. King's Will.

The issue as to which one of the various clauses of Mrs. King's Will may have disposed of her mineral interests is completely irrelevant to this case if the Will in any one or more of its clauses designated the beneficiaries under the mineral trust. In other words, the mineral trust survived the death of Mrs. King if beneficiaries were named in the specific devises, as well as if they were named in the devises of residuary property. Respondents say that the Will passed the mineral interests under the specific devises, rather than the residuary devises, and add that the Will did not purport to designate any *use or purpose* under the mineral trust. With this proposition as to uses and purposes petitioners are in complete agreement. The uses and purposes of the mineral trust were set forth *in the mineral trust* and were not meant to be found in Mrs. King's Will. *Only* the beneficiaries were to be found there.

It is certain that Mrs. King retained under the mineral trust the right to designate in her Will the beneficiaries under the mineral trust. The mineral trust plainly says so. Since all parties agree that Mrs. King's Will was effective to dispose of her entire mineral interests, it follows that whether such disposition was made in the specific devises or whether it was made in the residuary devises and bequests is immaterial to the mineral trust's survival. In either event the mineral trust survived Mrs. King's death.

We conclude that the Circuit Court of Appeals clearly erred in failing to follow the law of severance established by the decisions of the Texas courts and confirmed by opinions in this Court which are cited on page 27 of our Petition and which permitted Mrs. King to trustee her minerals and retain the right to name the beneficiaries under her mineral trust in her Will, as in the case of any other property.

3. The Humble 1933 Leases committed waste and extended beyond the trust term.

Finally respondents make no effective effort to justify the Humble 1933 mineral leases against our showing that they extended 18½ years and on in perpetuity beyond the end of the 10-year residuary trust under Mrs. King's Will. Before considering this matter, however, we consider the issue as to whether the Humble 1933 leases committed waste of the minerals in the trust estate.

Respondents in the effort to justify these leases and to avoid the charge of waste, state on page 11 of their Brief as follows:

> "The undisputed evidence showed that during her (Mrs. King's) lifetime the lands had been leased for mineral development several times and many wells had been drilled and *minerals actually produced.* Thus the land having been devoted to mineral development by the testator, even a life tenant could commit waste of the minerals under Texas decisions." (Italics ours.)

No Record references are given to support the foregoing statement that "minerals (were) actually produced" on Mrs. King's land in her lifetime. The Record shows conclusively that *not one drop of oil was ever produced on Mrs. King's ranch or other lands prior to her death* on March 31, 1925.

The Record clearly shows (R. 3096) that the only minerals actually produced on the King Ranch prior to 1935 were from the following three wells, all of which were both *commenced* and *completed* after Mrs. King's death, as follows:

King Well No. 2 commenced on September 20, 1925 and completed on December 8, 1925 at a depth of 2,312 feet as a producer.

Cross-State Well No. 2 commenced on May 3, 1925 and completed on September 26, 1925 at a depth of 2,123 feet as a producer.

Cross-State Well No. 3 started on February 8, 1926 and completed on April 5, 1926 at a depth of 2,121 feet as a producer.

Humble Oil & Refining Company, Respondent, which drilled each of the foregoing wells, produced 9,591.75 barrels of oil from King Well No. 2 and 28,802.04 from Cross-State Wells Nos. 2 and 3, or a total of 38,393.79 barrels, *all of which production was obtained after Mrs. King died.* Subsequently other production was had from the King ranch lands by Humble Oil & Refining Company as lessees under the Humble 1933 mineral leases *after the termination of the 10-year trust period under Mrs. King's Will.*

Thus it conclusively appears that respondents' argument that, because Mrs. King had developed minerals in her lifetime, "even a life tenant could commit waste of the minerals under Texas decisions" *cannot be sustained in this case,* because Mrs. King did *not* develop any oil or other minerals on any of her properties whatsoever during her lifetime.

As to the powers of the trustees under Mrs. King's Will to commit waste by leasing the minerals when the same was unnecessary in order to pay the small monthly annuities provided for her descendants during the 10-year trust period, respondents have affixed as an appendix to their Brief a copy of the Second Opinion rendered by the Supreme Court of Texas in the case of *Avis* v. *First National Bank of Wichita Falls* which was rendered on July 21, 1943 after our Petition for Certiorari was filed.

Even this Second Opinion of the Supreme Court of Texas in the *Avis* case is not final, for a Second Petition for Rehearing has been filed therein, and until the Texas Supreme Court shall act thereon the ultimate decision in that case will not be finally made known. Copies of the Second Petition for Rehearing in the *Avis* case are filed with this Reply Brief. Under the Second Opinion of the Texas Supreme Court, it is impossible to know what position the Texas courts will ultimately take on the important question whether a trust instrument granting a trustee or attorney in fact "the naked power to sell land" (as distinguished from the power to make mineral leases) "would give the trustee or attorney in fact the authority to execute an oil and gas lease upon such land," for the Texas Supreme Court there said: "On that question we express no opinion."

However this question may finally be decided, the respondents make no effective effort to meet petitioners' objection to the Humble 1933 leases that they extended 18½ years and on in perpetuity beyond the 10-year trust period.

Respondents completely ignore the cases cited in our Petition (pp. 39-40), which hold that *under Texas law*

and the common law generally the mere *general* power to lease or sell the trust estate does not give the trustees the *special* power to lease or sell minerals or other realty upon royalties, rentals or installments payable for 18½ years and possibly on in perpetuity *beyond the termination of the trust.*

Respondents cite *Greene* v. *Robison,* 8 S. W. (2) 655 and *Starke* v. *Guffey Petroleum Company,* 80 S. W. 1, as authority for the proposition that the trustees had the power to make mineral leases for a 20-year primary term. Neither of these cases had anything to do with the subject for which they are cited. *Greene* v. *Robison* held that the so-called Texas Relinquishment Act permitting the State of Texas to lease its school lands was valid under the Texas Constitution.

Starke v. *Guffey* held that a corporation organized under the Texas Corporation Act to conduct mineral operations and own mineral property had the power to enter into mineral leases. The interpretation of the Texas Statutes and Constitution has nothing whatever to do with the common law of trusts forbidding the making of long-term leases or installment sales *payable beyond the end of the trust term.*

Respondents argue, as petitioners anticipated, that the Humble 1933 mineral "leases" were "in fact *sales* of a fee determinable estate in the realty," and that the *power to sell* includes the power to make mineral leases, "since that is the usual and proper way to *sell* mineral rights," citing *Ehlinger* v. *Clark,* 8 S. W. (2) 666, and *Theisen* v. *Robison,* 8 S. W. (2) 646. Both of these decisions, like the case of *Greene* v. *Robison,* involved interpretations of the Texas Constitution and had no possible relation

to or connection with the general trust law forbidding the making of *leases or sales extending beyond the period of the trust.*

Antictipating that the respondents would contend that the Humble 1933 mineral leases were in fact *sales* and not true *leases,* we showed in our Petition that whether the transaction be termed a lease or a sale is irrelevant, the bar of the law of trusts being against *any transaction which extends beyond the trust term* and which is not fully consummated within it. We cited the Texas case of *Wisdom* v. *Wilson,* 127 S. W. 1128 as conclusive on this point, because it held that a trustee with discretionary *power of sale* had no power to enter into a contract *to sell real estate upon deferred payments extending beyond the termination of his trust.* The Texas court squarely held that this sale was invalid because "the power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale should be made for cash." This case conclusively demonstrates that the Humble 1933 mineral leases, whether they be considered as continuing *sales* or *leases,* were unauthorized under Mrs. King's Will.

Petitioners therefore pray that this Court will grant the Writ of Certiorari heretofore prayed herein to review the decree of the District Court as affirmed by the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

(4)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 140

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of Richard W. Atwood, distracted,

Petitioners,

Vs.

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Respondents.

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PETITIONERS' REPLY BRIEF TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.